

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Parts 300, 320, 330 and 350**

[Docket No. FR-4629-F-02]

RIN 2503-AA16

**Government National Mortgage Association Mortgage-Backed Securities Program—Payments to Securityholders; Book-Entry Procedures****AGENCY:** Government National Mortgage Association, HUD.**ACTION:** Final rule.

**SUMMARY:** This final rule issued by the Government National Mortgage Association (the "Association" or "Ginnie Mae") will govern payments on Ginnie Mae I and Ginnie Mae II Pass-Through Securities ("Ginnie Mae MBS") registered in the name of a securities intermediary and clearing corporation (a "Depository"). The rule requires that payments on Ginnie Mae MBS due to Depositories be made in immediately available funds and supersedes any current provisions allowing those payments to be made by check. Payments to other security holders may be made by check or other means provided the check is received by the security holder not later than the applicable payment date specified in the Ginnie Mae Mortgage-Backed Securities Guide (the "Ginnie Mae MBS Guide" or the "Guide"). The final rule eliminates any requirement that a physical certificate representing a Ginnie Mae MBS or, for consistency, a Ginnie Mae multiclass security ("Ginnie Mae Multiclass Securities," and together with Ginnie Mae MBS, "Ginnie Mae Securities") be maintained by a Depository. In addition, in the final rule, because the Federal Reserve Banks are expected to become Depositories for all book-entry Ginnie Mae Securities, Ginnie Mae is, consistent with the practices of other Federal entities with securities on the Fedwire Book-Entry Securities System, adopting an appropriate version of the standard technical rules under which book-entry Ginnie Mae Securities will be held and transferred on such system. The final rule follows publication of a February 26, 2001 proposed rule, takes into consideration public comment on the proposed rule, and make certain changes at this final rule stage.

**EFFECTIVE DATES:** October 1, 2001. This rule is applicable to electronic payments covered by § 320.5(h)(1), beginning with payments due on and after October 1, 2001. For the elimination of

certificates covered by § 320.5(g), the rule is applicable on the date on which each issue is first registered in the name of a Federal Reserve Bank. In no event, however, shall the applicability of the final rule with respect to any issue of Ginnie Mae Securities be earlier than October 1, 2001.

**FOR FURTHER INFORMATION CONTACT:** Thomas R. Weakland, Vice President, Office of Program Administration, Government National Mortgage Association, Department of Housing and Urban Development, Room 6204, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-2884. A telecommunications device for hearing-impaired persons (TTY) is available at (202) 708-9300. (The telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:****I. Background**

On February 26, 2001 (66 FR 12428), Ginnie Mae published a proposed rule that would require payments on Ginnie Mae I Modified Pass-Through Securities ("Ginnie Mae I MBS") with an issue date before October 1, 1998, and registered in the name of a Depository to be made in immediately available funds as prescribed by Ginnie Mae, thus superseding any current provision allowing payments to be made by check. The proposed rule also provided that, if payment on certificated Ginnie Mae I MBS was made by check, the check must be received by the securityholder not later than the 15th day of each month. In addition, the proposed rule would have eliminated any requirement that a Depository of a Ginnie Mae Security maintain a physical certificate evidencing such security.

**II. Reasons for This Rulemaking***A. Statutory Purpose*

Ginnie Mae, a wholly owned corporate instrumentality of the United States within the Department of Housing and Urban Development, was created as a distinct entity in 1968. Ginnie Mae can trace its origins to the creation of the National Mortgage Association of Washington (later renamed the Federal National Mortgage Association) on February 10, 1938, by the Federal Housing Administrator, acting under Title III of the National Housing Act. As stated in section 301 of the National Housing Act, Ginnie Mae's purposes are:

To establish secondary market facilities for residential mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to—

(1) Provide stability in the secondary market for residential mortgages;

(2) Respond appropriately to the private capital market;

(3) Provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing;

(4) Promote access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.

Ginnie Mae began guaranteeing mortgage-backed securities in 1970. Since that date, more than \$1 trillion of Ginnie Mae MBS have been issued and sold in the capital markets, and over \$600 billion of such securities currently are outstanding. Consistent with its legislative purpose, Ginnie Mae's guaranteed mortgage-backed securities program (the "MBS Program") has been a significant contributor to the expansion of homeownership opportunities for American families. Ginnie Mae has provided an efficient link between the capital markets, issuers and homebuyers. By making Ginnie Mae MBS attractive to investors, Ginnie Mae ensures that a continuous flow of private capital is available to fund mortgage loans. By helping to ensure that mortgage funds are available throughout the country, Ginnie Mae has been instrumental in eliminating regional differences in the availability of mortgage credit for American families.

In issuing the proposed rule, Ginnie Mae drew on its long experience and expertise in an effort to continue to satisfy its Congressionally mandated objectives. Most of the approximately \$600 billion of outstanding Ginnie Mae MBS are registered in the name of the current Depository, The Depository Trust & Clearing Corporation ("DTCC"), for the benefit of holders reflected on the books of DTCC. The final rule based on the proposed rule will enable Ginnie Mae to transfer the book-entry Ginnie Mae MBS to new Depositories, the Federal Reserve Banks. Ginnie Mae has determined that clearing, settling and paying Ginnie Mae MBS through the Federal Reserve Banks will further its statutory mission as established by Congress by increasing the liquidity of

Ginnie Mae MBS, decreasing the costs of issuance of Ginnie Mae MBS, enhancing the stability of Ginnie Mae's MBS programs, improving the market for Ginnie Mae MBS, and thus contributing to maximizing capital for residential mortgage financing and the public's access to such financing.

#### B. Request From the Securities Industry

Early in 2000, the investment industry asked Ginnie Mae whether the payment and settlement system of the Federal Reserve Banks could be used for Ginnie Mae MBS. The Federal Reserve Banks' Fedwire Book-Entry Securities System (the "Fedwire System") is used to clear, settle and pay all United States Treasury marketable debt instruments, most of the book-entry securities issued by other government agencies and government sponsored enterprises (collectively with the United States Treasury securities, referred to herein as "United States government securities") and the mortgage-backed securities ("Fannie Mae and Freddie Mac MBS") issued by Federal National Mortgage Association (now Fannie Mae) and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). The use of the Fedwire System for Ginnie Mae Securities also is consistent with recent recommendations of the International Securities Services Association for securities clearing and settlement systems to implement processes for delivery against payment and immediate payment in central bank monies.

#### C. Adopting the Fedwire System in This Final Rule

Ginnie Mae, after careful review and consideration of public comments, has concluded that the Fedwire System will provide a more efficient means to clear, settle and pay book-entry Ginnie Mae Securities.

1. *Uniformity.* By utilizing the Fedwire System, Ginnie Mae Securities would trade, clear and settle in the same manner as United States government securities and Fannie Mae and Freddie Mac MBS. The uniformity created by adding Ginnie Mae Securities to the Fedwire System will improve the market for Ginnie Mae Securities. As an incidental benefit, because of volume efficiencies, it is likely also to improve the market for other United States government securities and Fannie Mae and Freddie Mac MBS.

2. *Payment Efficiencies.* Use of Automated Clearing House ("ACH") debits in conjunction with the use of the Fedwire System will decrease payment delays and uncertainties and reduce costs.

*Eliminating Payment Delays.* Under Ginnie Mae's current rules, DTCC receives payments on Ginnie Mae MBS by electronic transfer or check and then credits those payments to the beneficial owners of Ginnie Mae MBS. DTCC has been able to accommodate Ginnie Mae's current rules and has been able to credit those payments on the next business day. The delay between the receipt of funds and credit of payments to beneficial owners of Ginnie Mae MBS is inefficient and inconsistent with how payments are made on other United States government securities and Fannie Mae and Freddie Mac MBS. In the Fedwire System, Federal Reserve Banks credit payments to security holders on the same business day the Federal Reserve Banks receive the payments. Same day credit should result in more favorable pricing for Ginnie Mae MBS because investors will not need to make pricing adjustments for payment delays.

*Eliminating Payment Uncertainties.* The use of ACH debits as the payment mechanism eliminates uncertainty as to principal payments—that is, the amount remitted to the investor will not be different from what is reported as being due to the investor.

*Reducing Costs.* In order to accommodate Ginnie Mae's current rules, DTCC has had to create lines of credit in order to cover the risk that issuers' checks will not clear in time to credit payments to securityholders. Maintaining the availability of lines of credit increases the costs of investing in Ginnie Mae MBS and subjects Ginnie Mae to a larger credit risk than under the proposed system.

3. *Attractiveness to Foreign Private Investors and Central Banks.* Ginnie Mae seeks to increase demand for its securities in order to reduce the cost of housing. With fewer United States Treasury securities on the market, Ginnie Mae MBS, carrying the full faith and credit of the United States government, are a desirable alternative investment for foreign investors seeking to maximize investment return with a minimum of credit risk. Use of the Fedwire System for settlement and clearing of Ginnie Mae Securities, including payments in United States central bank funds, will eliminate any perceived risk in having a private party (DTCC) involved in the payment system for Ginnie Mae Securities. Foreign investors, particularly foreign central banks, have indicated a preference for the Fedwire System.

Moreover, Ginnie Mae has considered the recent change in the focus of European central banks as a result of the European economic and monetary union. With the European Central Bank

assuming the responsibilities of monetary policymaking and implementation for the union, the task of maintaining price stability and managing foreign currency exchange for the eleven members of the union has shifted away from those members' central banks to the European Central Bank. As a result, the members' central bank reserves no longer are required for foreign exchange or monetary policy, and members increasingly focus on growing these reserves and maximizing the total return on such reserves. Most foreign central banks are members of the Fedwire System and can clear and settle directly with the Federal Reserve Banks without having to use an intermediary such as a clearing bank. Settling through DTCC would require foreign central banks to create new processes and procedures that create potential operational risks for them.

Ginnie Mae believes that foreign investors, particularly foreign central banks, will be more likely to invest in Ginnie Mae Securities if they are traded on the Fedwire System, and thus the change to the Fedwire System should expand the market and stimulate demand for Ginnie Mae Securities. This would further Ginnie Mae's statutory purposes of assisting the secondary market for residential mortgages and promoting access to mortgage credit by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential financing.

4. *Back Office Efficiencies.* Over time, having a single system through which United States government securities, Fannie Mae and Freddie Mac MBS and Ginnie Mae Securities are traded should result in decreased costs of back office operations for participants in the government securities market, including issuers of Ginnie Mae MBS. In addition, requiring issuers of book-entry Ginnie Mae I MBS who pay by check to convert to ACH payments should not impose operating inefficiencies on most issuers, because only three issuers now make payments on Ginnie Mae MBS exclusively by check.

5. *More Efficient Securities Settlement Functions.* In clearing and settling securities trades, the Federal Reserve Banks have a distinct advantage over DTCC. DTCC and the Federal Reserve Banks both process transactions using the "delivery against payment" mechanism. That is, the security and the payment for the security are exchanged simultaneously. This simultaneous exchange significantly eliminates settlement risk, because once the transfer is received it is final and cannot be reversed. However, under the

Fedwire System, transfers are settled immediately in central bank funds throughout the day. Thus, all Fedwire transfers are final as soon as the receiving institution is notified of the credit to its account.

In addition, all trades made by Federal Reserve Bank participants in United States Government securities, Fannie Mae and Freddie Mac MBS and Ginnie Mae MBS can be netted against each other, requiring less capital for settlement purposes.

6. *Eliminating Physical Securities.* In connection with the move to the Fedwire System, all physical certificates currently evidencing book-entry Ginnie Mae Securities will be eliminated. This move will eliminate the cost to the system of maintaining custodial facilities for physical certificates.

7. *Maximizing Capital and Access to Residential Mortgage Financing by the Public.* By instituting a single standard under the Fedwire System, Ginnie Mae believes that the secondary market for residential loans guaranteed by it will function more efficiently and increase liquidity for Ginnie Mae Securities, as described above. The overall effect of this should be to maximize capital available for residential mortgage financing. Ginnie Mae believes it has a duty to maximize administrative efficiencies that promote its central mission, as mandated by Congress, and has concluded that the change to payment by electronic means instead of by check fulfills and furthers this duty.

#### D. Conditions Governing Use of Fedwire System

In order to utilize the Fedwire System for clearing, settling and paying Ginnie Mae MBS, two changes to Ginnie Mae's MBS Program must be made. First, because the Federal Reserve Banks do not accept payments on securities by check, all payments made by issuers with respect to Ginnie Mae MBS must be made through ACH debits, or other electronic method acceptable to Ginnie Mae and the Federal Reserve Banks, in immediately available funds. Further, as noted in the Federal Reserve Bank of New York's comments on the February 26, 2001 proposed rule, in order to facilitate payment by ACH debit, issuers must hold funds in accounts that are capable of being accessed by ACH debit by or on behalf of the Federal Reserve Banks.

Second, in order to achieve the efficiencies and fungibility of a single system for transferring interests both in Ginnie Mae Securities and other United States government securities and Fannie Mae and Freddie Mac MBS utilizing the Fedwire System, the Federal Reserve

Banks have asked that Ginnie Mae adopt the regulations described in part 350 as part of the final rule. Part 350 is discussed in more detail below.

### III. Discussion of Public Comments

HUD received 12 public comments on its proposed rule. The following provides a discussion of the issues raised by the commenters and HUD's response to these comments.

#### Comment—Objection—The Loss of Float

Ginnie Mae received several comments essentially stating that issuers who make payments by check are entitled to continue to use this method of payment on book-entry Ginnie Mae I MBS, because this method provides them a monetary benefit that was taken into consideration in pricing their securities. This benefit, some commenters assert, is both a property right and a contract right.

*Response.* Ginnie Mae disagrees with these assertions as discussed below.

#### 1. Issuers Have No Property Right

Some of the commenters argue that they have a property right in the "float" created by non-electronic methods of payment, and that the proposed rule constitutes a "taking" of that property right by Ginnie Mae. In order to bring a successful Fifth Amendment takings claim, an issuer must demonstrate that its "private property [was] taken for public use, without just compensation." U.S. Constitution, Amendment V. As an initial matter, a plaintiff must demonstrate the existence of a "legally-recognizable property interest" and that the government interfered with plaintiff's use of that property. *See Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258 (1999). Ginnie Mae believes that the commenters cannot satisfy this test, for the following reasons.

(a) Neither Congress nor Ginnie Mae's MBS Program gave issuers a right to make payments by check. Further, the Ginnie Mae MBS Program does not permit issuers to earn interest on their principal and interest custodial accounts. *See* Guide, section 16–3(A) (requiring custodial accounts to be non-interest bearing accounts). If an issuer has made a separate arrangement with a custodial bank to receive a benefit resulting from the deposit of principal and interest collections, this separate arrangement and benefit neither creates a right to make payment by check nor binds Ginnie Mae. Moreover, to give issuers a right to the float would be inconsistent with the purposes set out in section 301 of the National Housing Act. Ginnie Mae's

authorizing legislation charged it with the responsibility for: Providing stability in the secondary market for residential mortgages; responding appropriately to the private capital market; and providing ongoing assistance to the secondary market for residential mortgages by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing. By enacting the proposed rule, Ginnie Mae is responding to this charge by taking measures that are needed to improve the efficiency and effectiveness of the secondary market for Ginnie Mae Securities.

(b) Changes over time in the speed of mail delivery and check collection and clearing processes also belie the notion that issuers have a property right in their float. In particular, inefficiencies in the collection of checks and the corresponding availability of funds led Congress to enact in 1987 the Expedited Funds Availability Act (Title VI of the Competitive Equality Banking Act of 1987), which set out standardized funds availability schedules and directed the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") to take further steps to reduce check clearing and processing times. Expedited Funds Availability Act, 12 U.S.C. 4001–4010 (2001). The act and regulations adopted by the Federal Reserve Board imposed shorter time periods between presentation of checks and the clearing of checks (the "settlement period") by requiring the "expeditious" return of checks or timely payment between banks. *See, e.g.*, 12 U.S.C. 4002 and 12 CFR 229.30, 339.36(f) (2001) (providing for same day funding for certain checks and cash equivalents). The Federal Reserve Board also was charged with the responsibility to consider further proposals to accelerate the settlement period between banks. *See* 12 U.S.C. 4008(b) and (c). Future technical innovations may cause the Federal Reserve Board to pursue even shorter check clearing times. Ginnie Mae is not aware of any successful challenge to such actions as "unconstitutional takings of float" by the Federal Reserve Board.

(c) A taking occurs when government action interferes with the affected party's "reasonable investment-backed expectations." *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Here, it is highly implausible that the issuers reasonably expected that more efficient payment methods would never be introduced during the life of the securities being issued. Ginnie Mae has, at considerable expense, adopted electronic processes in place of

inefficient, paper-based delivery methods as technological improvements have made such changes feasible. For example, in connection with the issuance of Ginnie Mae MBS, the Ginnie Mae Guide permits issuers to submit electronic versions of various schedules and documents via the GinnieNET 2020 system. See generally <http://www.ginniemae.gov>. Ginnie Mae also continues to improve electronic data interchange capabilities which allows trading partners to exchange reporting and additional information with one another and Ginnie Mae. See All Participants in Ginnie Mae Programs Memorandum 99-04 (Feb. 10, 1999). Technical improvements in the payment process on Ginnie Mae MBS are a natural extension of Ginnie Mae's electronic and automation initiatives.

The value, significance and cost of Ginnie Mae's full faith and credit guaranty, coupled with continued issuance of Ginnie Mae certificates after adoption of mandatory payment by wire transfer, effective for Ginnie Mae I MBS with an issue date on or after October 1, 1998, without any change in the guaranty fee, belie any contention that payment by check was an "investment-backed" expectation. Similarly, the evolving changes in the check collection process under the mandate of the Funds Availability Act undercut any "investment-backed expectation" that issuers would always have the benefit of float.

(d) There is no set formula for determining whether a deprivation of property constitutes a taking. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (rejecting a takings challenge to legislation that, by requiring private employers who chose to withdraw from multiemployer pension plans to pay a proportionate share of the plan's unfunded but vested benefits in order to prevent the failure of the plans, created liability in excess of the limited liability expressly fixed by the pension plan agreements). Indeed, no wrongful taking has been found to occur when the government adjusts private economic rights for the common good rather than simply appropriating fees for the government's own use. See *Connolly* at 225, 227 (emphasizing that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent Amendments to achieve the legislative end." (quoting *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958))).

(e) Applying the foregoing test, issuers receive the benefits of Ginnie Mae's guaranty of their securities under what is clearly a regulatory scheme. Issuers

could reasonably expect that Ginnie Mae would exercise its regulatory powers to make adjustments to its programs to fulfill its legislative mandate. Ginnie Mae is acting in its regulatory capacity under a public program and in accordance with Ginnie Mae's legislative purpose: to maintain and enhance the value and liquidity in the secondary market for mortgage loans and mortgage-backed securities.

(f) The mortgage loan industry and its secondary market has been moving steadily toward paperless execution as technology advances—mortgage bankers are originating mortgage loans over the internet, mortgages are being registered under central registry systems, securities are being issued in book-entry form, and substantially all United States government securities and Fannie Mae and Freddie Mac MBS are issued in electronic form and require electronic payments. Ginnie Mae's adoption of electronic payment requirements for all Ginnie Mae MBS with an issue date on or after October 1, 1998, was merely one in a series of business practice changes that have been adopted to keep up with changing technology and a fast-developing financial market. As discussed above, in response to technology and at the request of issuers, Ginnie Mae incurred substantial costs to provide issuers the ability to submit mortgage pools electronically and to exchange reports and data electronically. Commenters could have reasonably expected this innovation in the method of payment.

## 2. No Limitation on Ginnie Mae's Ability To Modify Contract Rights

As noted earlier, the commenters also asserted the retention of making payments by check on the basis of contract rights. The commenters stated that their "contracts" under the Ginnie Mae MBS Program allow them to continue to make payments by check, and that Ginnie Mae is otherwise bound by whatever outmoded business practices existed at the time the contracts were entered into. Ginnie Mae disagrees for the following reasons.

(a) The proposed rule does not change the date by which payments are required to be paid to security holders. DTCC is the security holder and DTCC is paid on the payment date. The same commenter suggests that some investors may prefer to receive payment by check. If an investor wishes to receive payments by check, then the investor may request the issuance of a physical certificate.

Payment by electronic transfer is the payment mechanism for all book-entry Ginnie Mae I MBS with issue date on or

after October 1, 1998, all Ginnie Mae II MBS, all United States government securities and Fannie Mae and Freddie Mac MBS held in the Fedwire System, and most privately-issued mortgage-backed securities.

(b) Even if the method of payment on Ginnie Mae I MBS were considered a part of a contract between Ginnie Mae and the issuers, Ginnie Mae nonetheless has authority to regulate the method of payment under the United States Supreme Court's "unmistakability doctrine." See *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (finding that in the absence of an unmistakable promise to the contrary, all "contractual arrangements, including those to which the sovereign is a party, remain subject to subsequent legislation by the sovereign"); *United States v. Winstar*, 518 U.S. 839 (1996); and *Grass Valley Terrace v. United States*, 46 Fed. Cl. 629 (2000) (finding that the "unmistakability doctrine" applies to all government contracts, and that the government had not made an unmistakable promise not to change borrowers' contractual prepayment options because the prepayment options were not "the essence of the agreement" between the government and the borrowers). But see *General Dynamics Corp. v. United States*, 74 Fed. Cl. 514 (2000) (adopting a two-step analysis which first determines if the government action regarding a contract is a "public and general" act rather than a way of releasing the government from its own contractual obligations, and if so, then applies the unmistakability doctrine; and finding that government action for the purpose of reducing federal expenses is not a "public and general act"). Here, Ginnie Mae is requiring electronic payment to further its statutory mission established by Congress, not to avoid an obligation.

(c) Applying the "unmistakability doctrine" to Ginnie Mae's proposal, it would have to be established that either:

(1) Ginnie Mae made an unmistakable promise not to exercise its sovereign power to regulate the method of payment on Ginnie Mae MBS, or

(2) The issuers' option to make payment by check was "the essence of" or at least a significant part of the essence of their agreement with Ginnie Mae.

Ginnie Mae believes that neither is the case.

(d) Nothing in Ginnie Mae's Charter Act, its regulations, the Ginnie Mae MBS Guide or Ginnie Mae's guaranty agreements (as discussed below) suggest that Ginnie Mae would *not* exercise its

regulatory authority with respect to maintaining and enhancing the value and liquidity in the secondary market for mortgage loans and mortgage-backed securities. Indeed, Ginnie Mae acts on a regular basis, as evidenced by the change in the Ginnie Mae MBS Guide regarding issuances of Ginnie Mae I MBS on and after October 1, 1998, to make the market for Ginnie Mae I MBS more efficient.

(e) Similarly, nothing in Ginnie Mae's Charter Act, its regulations, the Ginnie Mae Guide or Ginnie Mae's guaranty agreements suggest that Ginnie Mae waived its right to modify the terms of its MBS Program. Ginnie Mae MBS are issued pursuant to the Ginnie Mae MBS Guide, which specifies, among other things, the methods by which payments are required to be made on Ginnie Mae MBS. The Ginnie Mae MBS Guide permits Ginnie Mae to modify the Guide from time to time, so long as such modifications are consistent with applicable laws and regulations and its outstanding guaranty agreements. In its guaranty agreements with issuers, Ginnie Mae agrees to guarantee payments of principal and interest payable by issuers to holders of Ginnie Mae MBS in return for a guaranty premium and the issuers' commitments to comply with the guaranty agreement and the provisions of the Ginnie Mae MBS Guide (to the extent such provisions do not conflict with the guaranty agreements) as the Guide may be amended from time to time. The guaranty agreements neither include the specific terms of the Ginnie Mae MBS nor specify the methods by which payments are required to be made by the issuers to security holders. Consequently, Ginnie Mae has reserved the right to change the methods by which payments are made to security holders.

(f) The commenters also have not established that the right to make payment by check goes to "the essence of the agreement" with Ginnie Mae. In this case, there is no doubt that, if there is a contract between Ginnie Mae and its issuers, then a viable contract still remains if nothing is changed other than the method of making payments. This is evidenced by the fact that issuers voluntarily make electronic payments on certificated Ginnie Mae I MBS (even though issuers are permitted to make these payments by check) and that issuers have continued to issue Ginnie Mae I MBS after the date on which electronic payments were required to be made with respect to all new issuances.

(g) The commenters seem to propose that, even if there is no express provision in the contracts limiting

Ginnie Mae's authority to modify the payment rules, by implication they have the right to make payments in whatever manner they please. Ginnie Mae reads no such implication into its program documents. Any such implication would be contrary both to the doctrine of unmistakability and to what Congress has by statute, as discussed above, directed Ginnie Mae to do.

### 3. Estoppel Does Not Run Against Ginnie Mae

With no basis for a claim of property right or contract right, it appears that the commenters' essential claim is one of promissory estoppel. Because Ginnie Mae has allowed payment by check in the past and the commenters have benefited from this practice, they allege a legal "right" has been created. Ginnie Mae has considered this claim very carefully under the legal tenets discussed below, but ultimately, concludes that the claim of a right to inefficient payment here is not justified.

Taking another approach, one commenter states that, when Ginnie Mae amended its MBS Guide in 1998 and left in place the check paying method for Ginnie Mae I MBS with an issue date before October 1, 1998, Ginnie Mae in effect "ratified" that check paying method and is now estopped from changing it.

(a) The ordinary rules of estoppel do not apply when estoppel is claimed against the government. A party asserting estoppel against the government bears a "heavy burden," and the Supreme Court has never been hospitable toward such claims. See *Bateman v. Federal Deposit Insurance Corporation*, 112 F. Supp.2d 89, 94 (D. Mass. 2000); *Heckler v. Community Health Services, Inc.*, 467 U.S. 51 (1984); and see generally Annot., Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and its Agencies, 27 ALR Fed. 702 (2000); Annot., Applicability of Doctrine of Estoppel Against Government and its Governmental Agencies, 1 ALR 2nd 338 (1999).

(b) Some opinions suggest that there might be estoppel against the government if there is "affirmative misconduct." See *Melrose Associates v. United States*, 45 Fed. Cl. 56, 59 (Ct. Fed. Cl. 1999), *aff'd without opinion*, 2001 U.S. App. LEXIS 3251 (Fed. Cir. Feb. 12, 2001). But the commenters have not claimed any misconduct by Ginnie Mae. As explained above, the action Ginnie Mae takes today is taken out of a desire to follow the directions Congress has given it.

(c) Although the Supreme Court has stopped short of establishing a rule

barring all claims of estoppel against the government, it has found that "the whole history and practice with respect to claims against the United States reveals the impossibility of an estoppel claim for money in violation of a statute." *Spiroff v. United States*, 95 F. Supp.2d 673, 677-78 (E.D. Mich. 2000). Ginnie Mae does not perceive any special circumstances here that would justify such a claim.

(d) If the claim of equitable estoppel were between two private parties, the claimant would have to prove several things, including that he was ignorant of material facts known to the other party. See *Penny v. Giuffrida*, 897 F.2d 1543 (10th Cir. 1990). Even if the ordinary estoppel rules apply to Ginnie Mae's actions, the commenters have not alleged that Ginnie Mae failed to disclose material facts that were known only to it.

### Comment—Less Burdensome Alternatives to Ginnie Mae's Proposal

Several commenters stated that the proposed regulation unfairly burdens issuers who pay by check and that there are less burdensome alternatives to eliminating the float enjoyed by these issuers. The commenters suggested five specific alternatives.

*Response.* Ginnie Mae has carefully considered each alternative and determined that grafting any of these alternatives into the Fedwire System to accommodate Ginnie Mae Securities would not satisfy two important Ginnie Mae goals—uniformity of treatment with United States government securities and Fannie Mae and Freddie Mac MBS and elimination of payment uncertainties—that will be achieved by adoption of the final rule. In addition, the responses set out below more fully explain why each alternative is not a solution that benefits Ginnie Mae issuers and investors generally.

*Alternative 1.* Allow issuers of Ginnie Mae I MBS with an issue date before October 1, 1998, that currently remit by check on the 15th of the month, to wire payments on such securities on the 16th of the month. To implement this alternative, commenters suggested that Ginnie Mae advise investors currently paid by check that if they want to receive funds by wire transfer on such Ginnie Mae I MBS, then the investors must agree to be paid on the 16th.

*Response.* The simple problem with this alternative is that it defeats the uniformity that Ginnie Mae is seeking. Were this alternative adopted, some otherwise fungible Ginnie Mae I MBS would pay on one date, while others would be paid on another date.

*Alternative 2.* Move all book-entry Ginnie Mae MBS to the Fedwire System except for Ginnie Mae I MBS issued prior to October 1, 1998. Securities remaining at DTCC would include securities with respect to which issuers are currently paying electronically in order to defray DTCC costs, including operating costs and the cost of funding check-paying issuer's float.

*Response.* Again, a significant problem with this alternative is that it defeats the uniformity that Ginnie Mae is seeking with respect to the payment dates for otherwise fungible book-entry Ginnie Mae I MBS. Further, Ginnie Mae will lose the operation of efficiencies it seeks if it has separate processes dependent upon a Ginnie Mae MBS's date of issuance.

In addition, there are practical difficulties. It is not clear whether DTCC would continue such limited MBS operations after securities that were issued on or after October 1, 1998 moved to the Fedwire System. DTCC, as the registered security holder, receives most payments for book-entry Ginnie Mae I MBS electronically on the 15th of the month. There are no restrictions on DTCC's investment of such funds, and DTCC accrues interest on the funds overnight and pays the beneficial owners of such securities on the next business day. The investors have agreed that DTCC could pay them on the 16th of the month because the investors own DTCC and the interest that DTCC earns pays for its operations and enables it to advance funds to cover payments on the 16th for those checks that have not cleared. If the amount of securities paying electronically were significantly reduced, the funds available for operational expenses would be similarly reduced. It is not clear that the remaining interest would be sufficient to entice DTCC into continuing operations.

*Alternative 3.* Use a third party to process the issuers' checks with respect to book-entry Ginnie Mae I MBS issued before October 1, 1998.

*Response.* As in the case of alternatives 1 and 2, this alternative will result in two income payment dates. Furthermore, if Ginnie Mae arranged for a third party to process checks on the 15th, it is unlikely to obtain same day clearing and payment for those checks. Therefore, someone would still need to advance funds to cover checks so that investors in such securities could be paid on the 15th. Ginnie Mae has no legal authority to bear the cost of putting in place and maintaining such a process for the exclusive financial benefit of issuers that want to write checks. Moreover, such a process would not

eliminate the risks associated with the involvement of a private party in the payment process. Thus, neither the added complication and expense nor the uncertainties of involving third parties in the payment process can be justified.

*Alternative 4.* Either Ginnie Mae or The Bond Market Association could reimburse affected issuers for monthly losses on float.

*Response.* Because Ginnie Mae has the authority to make the MBS Program changes contained in this final rule, it has no obligation to reimburse issuers for any loss of float occasioned by adoption of this rule. With respect to the suggestion that The Bond Market Association bear such expense, Ginnie Mae has no authority to impose this expense on the Association. The Bond Market Association has not indicated that it is willing to pay this expense.

*Alternative 5.* Ginnie Mae can reduce the guaranty fee payable by affected issuers to reimburse them for monthly losses on float.

*Response.* Again, because Ginnie Mae has the authority to make the MBS Program changes contained in this final rule, it has no obligation to reimburse issuers for any loss of float occasioned by adoption of this rule.

Comment—Objection to Administrative Process

Ginnie Mae received several comments questioning whether Ginnie Mae had followed proper administrative procedures. The commenters claim that thirty days was inadequate time for them to comment on the proposal.

*Response.* Ginnie Mae disagrees for the following reasons:

(a) HUD acknowledges that it is the general practice of HUD to provide a 60-day public comment period on all proposed rules. HUD, however, reduced its usual 60-day public comment period to 30 days for its February 26, 2001 proposed rule since most issuers would not be affected by the rule and the rule was not anticipated to implement changes that would be considered controversial. The proposed changes ensure that Ginnie Mae keeps pace with the efficiencies and effectiveness of modern systems and technology.

(b) HUD believes that the 30-day public comment period provided an adequate response time for the February 26, 2001 rule. The change in the method of payment is a fairly simple proposal that HUD believes should have been anticipated by the issuers in light of Ginnie Mae's previous adoption of other changes in its MBS programs to incorporate market innovations.

(c) The 30-day comment period also was adequate given the small number of persons affected by the proposed change. Approximately 24 out of approximately 300 issuers of Ginnie Mae I MBS make payments on book-entry securities by check. Of those 24 issuers, all but three issuers also make payments electronically on Ginnie Mae I MBS issued on or after October 1, 1998, and Ginnie Mae II MBS. Thus, for most affected issuers, the long-term benefits resulting from implementation of the final rule will far outweigh the short-term disadvantages for pre-October 1998 Ginnie Mae I MBS.

Moreover, Ginnie Mae has considered all comments that it has received on the proposed regulation, even comments received more than thirty days after the end of the comment period.

In addition to **Federal Register** publication, Ginnie Mae also provided notification and a description of its proposed rule in its All Participants in Ginnie Mae Programs Memorandum 01-07 (March 15, 2001). Ginnie Mae was not required to provide any additional notice of the proposed rulemaking to participants in its programs, and the memorandum was one of the routine communications that Ginnie Mae from time to time sends to participants in its programs. One of the commenters suggested that Ginnie Mae had violated the Administrative Procedures Act because it believed the description of the proposed rule in the memorandum implied that Ginnie Mae's decision to issue the new payment rule was predetermined. To the contrary, Ginnie Mae anticipated and has fully considered all comments received in response to the February 26, 2001 proposed notice, as well as the other factors discussed above.

Two commenters objected to the three-month period for implementing the conversion to the Fedwire System, which was described in the All Participants in Ginnie Mae Programs Memorandum referred to in the preceding paragraph. These commenters noted that the three-month conversion process requires issuers to bear the expense associated with programming changes that will be used for a short period and then discarded after completion of the conversion. These commenters suggest that this burdensome process could be eliminated if Ginnie Mae adopted a one-time conversion date for all Ginnie Mae Securities. While it has considered this approach, the Ginnie Mae Conversion Subcommittee, including representatives from broker-dealers, Bond Market staff, Ginnie Mae, Federal Reserve, DTCC, clearing banks and

custodial banks, has concluded that it would be impossible to convert all \$600 billion of outstanding Ginnie Mae Securities to the Fedwire System over one weekend.

Finally, one commenter objects, as well, to the short time frame between the adoption of the final rule and the date on which the conversion process is to begin, also as described in the All Participants in Ginnie Mae Programs Memorandum 01-07. This commenter notes that the 60- to 75-day time frame does not allow adequate time for testing and implementing the programming code changes necessary to effect the conversion to the Fedwire System, and diverts personnel needed to implement other systems' enhancements. Ginnie Mae has discussed this issue with the commenter and determined that some of the system changes anticipated by the commenter will not be required because of information that Ginnie Mae will provide via its GinnieNET System. Ginnie Mae has carefully considered this comment, and concludes that its conversion timetable should allow issuers adequate time to prepare for the conversion.

#### C. Conclusion

Ginnie Mae is charged with the responsibility for providing stability in the secondary market for residential mortgages, responding appropriately to the private capital market and providing ongoing assistance to the secondary market for residential mortgages by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing. Ginnie Mae carefully considered all comments on the rule and in issuing this final rule, which will improve the efficiency and effectiveness of the secondary market for Ginnie Mae MBS, Ginnie Mae is appropriately responding to its Congressional charge.

#### IV. Changes Made at the Final Rule Stage

The final rule incorporates several changes to the proposed rule. First, § 300.3 is included to reflect that The Government National Mortgage Association may be referred to variously as "the Association," "GNMA" or "Ginnie Mae." Second, references in part 320 of the proposed rule to "Ginnie Mae I MBS" have been changed throughout the final rule to "mortgage-backed securities." This change was made for administrative convenience and is not substantive. Part 320 authorizes Ginnie Mae's guaranty of certain mortgage-backed securities. Ginnie Mae's mortgage-backed

securities program is embodied in the Ginnie Mae MBS Guide, which denominates certain securities as Ginnie Mae I MBS and others as Ginnie Mae II MBS. The Guide was modified and updated in 1998 to require electronic payment on all Ginnie Mae I MBS issued on or after October 1, 1998. Although the Guide already requires electronic payments on Ginnie Mae II MBS, because part 320 covers both types of Ginnie Mae guaranteed mortgage-backed securities, Ginnie Mae has determined that the final rule with respect to electronic payment should refer to "mortgage-backed securities" (which term currently is used throughout part 320 and would cover both Ginnie Mae I and Ginnie Mae II MBS), rather than Ginnie Mae I MBS.

Next, for similar reasons, Ginnie Mae has modified proposed § 320.5(h)(ii) to refer to the applicable payment date as specified in the Guide rather than to the 15th day of the month. Ginnie Mae I MBS pay on the 15th day of each month or, if such day is not a business day, the next business day. Ginnie Mae II MBS generally pay on the 20th day of each month or the next business day. Again, because part 320 covers both types of Ginnie Mae guaranteed mortgage-backed securities, Ginnie Mae has determined that the final rule should refer to the generic term "applicable payment date" in order to preserve existing payment dates.

The Federal Reserve Bank of New York (the "Reserve Bank") provided comments in support of the proposed rule. The Reserve Bank's comments are technical in nature, complement the other changes effected by the proposed rule and are logical outgrowths of the proposed rule. First, the Reserve Bank recommended that Ginnie Mae follow the practice of entities, such as the United States Department of Treasury, other government agencies, Fannie Mae and Freddie Mac, with securities on the Fedwire System by adopting the standard technical "book-entry rules" under which such securities are held and transferred on the Fedwire System. The standard technical rules are well defined, widely known and inform investors and pledgees of the precise nature of their interest in securities held through the Fedwire System. Ginnie Mae agrees with the Reserve Bank, and believes that the "book-entry rules," included as new part 350 in the final rule, are not controversial and would not have been opposed had they been included in the proposed rule. As discussed above, adoption of the "book-entry rules" is consistent with the objective of having United States government securities, including Ginnie

Mae Securities, and mortgage-backed securities issued by Fannie Mae and Freddie Mac trade under the same rules.

Second, to facilitate the use of the Fedwire Book-Entry Securities System and to achieve the objectives sought to be obtained by Ginnie Mae, the Reserve Bank suggested that Ginnie Mae amend its proposed § 320.5(h)(1)(i) by requiring issuers to maintain funds in accounts that are accessible by ACH debit transactions originated by or on behalf of the Depository. In addition, the Reserve Bank asked that the definition of "Depository" in proposed §§ 320.5(j) and 330.5 be modified to clarify that the Federal Reserve Banks act as clearing corporations for purposes of Article 8 of the Uniform Commercial Code. Finally, the Reserve Bank requested a revision to proposed § 320.5(h)(2)(i)—cross-referencing the section of the regulation in which Ginnie Mae's guaranty is described. Ginnie Mae agrees that these changes are technical rather than substantive in nature, and has incorporated them in the final rule.

#### V. Other Matters

In the proposed rule, Ginnie Mae solicited comments on the effect and desirability of mandating electronic payments on certificated Ginnie Mae I MBS, which comprise approximately 1.4% of outstanding Ginnie Mae I MBS. Ginnie Mae received no comments with respect to this proposal and at this time is not making any change in the final rule that affects the manner in which payments are made on certificated Ginnie Mae I MBS.

#### VI. Findings and Certifications

##### *Regulatory Flexibility Act*

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this final rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule addresses ministerial functions associated with the Ginnie Mae MBS program, such as the manner of dividend payments and the method used to document ownership of certificates.

##### *Environmental Impact*

This rule encompasses activities of the Government National Mortgage Association under Title III of the National Housing Act (12 U.S.C. 1716, et. seq.). Therefore, in accordance with 24 CFR 50.19(c)(19) of HUD's regulations, this rule is categorically excluded from environmental review under the National Environmental

Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

#### *Executive Order 13132, Federalism*

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

#### **List of Subjects in 24 CFR Parts 300, 320, 330 and 350**

Mortgages, Securities.

Accordingly, parts 300, 320 and 330 of title 24 of the Code of Federal Regulations are amended, and part 350 of title 24 of the Code of Federal Regulations is added as follows:

#### **PART 300—GENERAL**

1. The authority for citation for 24 CFR part 300 continues to read as follows:

**Authority:** 12 U.S.C. 1723a, unless otherwise noted, and 42 U.S.C. 3535(d).

2. Section 300.3 is revised to read as follows:

##### **§ 300.3 Description.**

The Government National Mortgage Association (hereinafter in this chapter called the Association, GNMA or Ginnie Mae) furnishes fiduciary services to itself and other departments and agencies of the Government, and guarantees privately issued securities backed by trusts or pools of mortgages or loans which are insured or guaranteed by the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA) or the Rural Housing Service (RHS) and certain other loans or mortgages guaranteed or insured by the Government. In the

course of its business, the Association is referred to as GNMA or Ginnie Mae.

#### **PART 320—GUARANTY OF MORTGAGE-BACKED SECURITIES**

3. The authority citation for 24 CFR part 320 continues to read as follows:

**Authority:** 12 U.S.C. 1721(g) and 1723a(a); 42 U.S.C. 3535(d).

4. Section 320.5 is amended by revising paragraph (g) and adding paragraphs (h), (i), and (j) to read as follows:

##### **§ 320.5 Securities**

\* \* \* \* \*

(g) *Registered Ownership.* Ownership of mortgage-backed securities issued pursuant to this subpart registered in the name of a Depository shall be conclusively established by registration in the name of the Depository as owner on the Association's central registry and it shall be unnecessary for a Depository to maintain custody of any physical certificates evidencing such ownership.

(h) *Payments on Mortgage-Backed Securities.* Issuers must remit all payments due to holders of mortgage-backed securities such that holders will receive their installments as follows:

(1) *Payment to a Depository.* (i) For all securities registered in the name of a Depository or the designated nominee for a Depository, issuers are required to make payments in immediately available funds by ACH transaction, Fedwire, or by such other method as directed and/or authorized by the Association pursuant to the MBS Guide, including requiring that issuers maintain funds accounts in institutions that are accessible by debit ACH transactions originated by such Depository or its designee.

(ii) Payment must be made by the hour specified in the MBS Guide on the calendar day of the month specified in the MBS Guide for payment on such mortgage-backed securities (the "applicable Payment Date"), with adjustments to such time as may be specified in the MBS Guide for Payments Dates that do not fall on business days.

(2) *Payments to other holders.* An issuer of mortgage-backed securities that are not registered in the name of a Depository or its nominee may make payments to a security holder by ACH transaction or Fedwire, provided that it obtains the prior written approval of the holder of such mortgage-backed securities. If an issuer begins to make such payments by electronic transfer, it must continue to do so while the securities are registered in the name of that security holder. If an issuer makes

payments on mortgage-backed securities by check, the check must be received by the security holder not later than the applicable Payment Date each month.

(i) *Guaranty.* The Association's guaranty described in § 320.13 is a guaranty that payment will be made to the registered owner of securities as reflected in the Association's central registry. The Association makes no other guaranty, including any guaranty that a Depository will appropriately credit payments to beneficial owners of such mortgage-backed securities. The Association's guarantee of securities payable to a Depository or its nominee becomes effective when the Depository or its nominee is registered as the registered owner of the securities on the Association's central registry.

(j) *Definition of Depository.* As used in this section, Depository means a clearing corporation within the meaning of Article 8 of the Uniform Commercial Code, including any Federal Reserve Bank, that maintains systems by which ownership and transfer of interests in mortgage-backed securities are made through the books of such clearing corporation.

#### **PART 330—GUARANTY OF MULTICLASS SECURITIES**

5. The authority citation for 24 CFR part 330 continues to read as follows:

**Authority:** 12 U.S.C. 1721(g) and 1723a(a); 42 U.S.C. 3535(d).

6. Revise § 330.5 to read as follows:

##### **§ 330.5 Definitions.**

As used in this part, the following terms shall have the meanings indicated:

*Consolidated securities.* A series of multiclass securities, each class of which provides for payments proportionate with payments on the underlying eligible collateral.

*Depositor.* The entity that deposits, or executes an agreement to deposit, as contained in the Multiclass Guide, eligible collateral into a trust in exchange for consolidated securities.

*Depository.* A clearing corporation within the meaning of Article 8 of the Uniform Commercial Code, including any Federal Reserve Bank, that maintains systems by which ownership and transfer of interests in Ginnie Mae multiclass securities are made through entries on the books of such clearing corporation.

*GNMA electronic bulletin board.* An information distribution system established by the Association for the Multiclass Securities program.



*GNMA MBS certificates.* The guaranteed mortgage-backed securities issued under part 320 of this chapter.

*Government mortgages.* Mortgages that are eligible under section 306(g) of the National Housing Act (12 U.S.C. 1721(g)) for inclusion in GNMA mortgage-backed securities pools.

*Multiclass Registrar.* The institution that is specified by the Association as the registrar of the related class and series of multiclass securities.

*Participant.* For structured securities, the sponsor, co-sponsor, trustee, trust counsel, and accounting firm. For consolidated securities, the depositor. Other entities may be designated as participants in the Multiclass Guide.

*Sponsor.* With respect to structured securities, the entity that establishes the required trust executing the trust agreement and depositing the eligible collateral in the trust in exchange for the structured securities.

*Structured securities.* Securities of a series at least one class of which provides for payments of principal or interest disproportionately from payments on the underlying eligible collateral.

7. Revise § 330.30 to read as follows:

**§ 330.30 GNMA Guaranty.**

(a) *Securities held by Depositories.* Ownership of multiclass securities registered in the name of a Depository shall be conclusively established by registration in the name of the Depository as owner on the books and records of the Multiclass Registrar, and it shall be unnecessary for a Depository to maintain custody of any physical certificates evidencing such ownership.

(b) *Guaranty.* The Association's guaranty is a guaranty that payment will be made to the registered owner of securities as reflected on the books and records of the Multiclass Registrar.

(1) The Association makes no other guaranty, including any guaranty that a Depository will appropriately credit payments to beneficial owners of GNMA multiclass securities. The Association's guaranty of securities payable to a Depository or its nominee becomes effective when the Depository or its nominee is registered as the registered owner of the securities on the books and records of the Multiclass Registrar.

(2) The Association guarantees the timely payment of principal and interest as provided by the terms of the multiclass security. The Association's guaranty is backed by the full faith and credit of the United States.

8. Add Part 350 to read as follows:

**PART 350—BOOK-ENTRY PROCEDURES**

Sec.

350.1 Purpose.

350.2 Definitions.

350.3 Maintenance of Ginnie Mae Securities.

350.4 Law governing rights and obligations of United States, and Federal Reserve Banks as Depositories; Rights of any Person against United States, and Federal Reserve Banks as Depositories; Law Governing Other Interests.

350.5 Creation of Participant's Security Entitlement; Security Interests.

350.6 Obligations of the Reserve Banks as Depositories; No Adverse Claims.

350.7 Authority of Federal Reserve Banks as Depositories.

350.8 Withdrawal of Eligible Book-entry Ginnie Mae Securities for Conversion to Definitive Form.

350.9 Waiver of Regulations.

350.10 Liability of Federal Reserve Banks as Depositories.

350.11 Notice of Attachment for Ginnie Mae Securities in Book-entry System.

**Authority:** 12 U.S.C. 1721(g) and 1723a(a); 42 U.S.C. 3535(d).

**§ 350.1 Purpose.**

The purpose of this part is to achieve the efficiencies and fungibility through use of a single system for transferring interests both in Ginnie Mae Securities and other United States Government securities and in mortgage-backed securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. The Association only guarantees that payments required to be made by issuers of Ginnie Mae Securities will be made to the registered owner of those Ginnie Mae Securities. The Association undertakes no other obligation. Under the Book-entry System, the Federal Reserve Banks will be the registered owner of Book-entry Ginnie Mae Securities, not the agent of the Association, and the Association makes no warranty or guaranty with respect to the maintenance of the Book-entry System by the Federal Reserve Banks.

**§ 350.2 Definitions.**

(a) *Specified Terms.* As used in this part, the following terms shall have the meanings indicated:

*Book-entry Ginnie Mae Security.* A Ginnie Mae Security issued or maintained in the Book-entry System. Book-entry Ginnie Mae Security also means the separate interest and principal components of a Book-entry Ginnie Mae Security if such security has been designated by Ginnie Mae as eligible for division into such components and the components are maintained separately on the books of one or more Federal Reserve Banks.

*Book-entry System.* The automated book-entry system operated by the Federal Reserve Banks acting as Depositories for Ginnie Mae, on which Book-entry Ginnie Mae Securities are recorded, transferred and maintained in book-entry form.

*Definitive Ginnie Mae Security.* A Ginnie Mae Security in engraved or printed form, or that is otherwise represented by a certificate.

*Depository.* A clearing corporation within the meaning of Article 8 of the Uniform Commercial Code, including any Federal Reserve Bank, that maintains systems by which ownership and transfer of interests in Book-entry Ginnie Mae Securities are made through entries on the books of such clearing corporation.

*Eligible Book-entry Ginnie Mae Security.* A Book-entry Ginnie Mae Security issued or maintained in the Book-entry System which by the terms of its Security Documentation is eligible to be converted from book-entry form into definitive form.

*Entitlement Holder.* A Person to whose account an interest in a Book-entry Ginnie Mae Security is credited on the records of a Securities Intermediary.

*Federal Reserve Bank Operating Circular.* The publication issued by each Federal Reserve Bank that sets forth the terms and conditions under which the Reserve Bank maintains book-entry securities accounts (including Book-entry Ginnie Mae Securities accounts) and transfers book-entry Securities (including Book-entry Ginnie Mae Securities).

*Ginnie Mae Security.* Any security or obligation guaranteed as to payment of principal and/or interest by Ginnie Mae under its Charter Act and issued in the form of a Definitive Ginnie Mae Security or a Book-entry Ginnie Mae Security.

*Participant.* A Person that maintains a Participant's Securities Account with a Federal Reserve Bank.

*Person.* An individual, corporation, company, governmental entity, association, firm, partnership, trust, estate, representative, and any other similar organization, but such term does not mean or include the United States or a Federal Reserve Bank.

*Revised Article 8.* The same meaning as in 31 CFR 357.2.

*Secretary.* The Secretary of Housing and Urban Development and, where appropriate, any person designated by the Secretary to perform a particular function for the Secretary, including any HUD officer, employee, or agent.

*Security.* Any mortgage participation certificate, note, bond, debenture, evidence of indebtedness, collateral-trust certificate, transferable share,

certificate of deposit for a security, or, in general, any interest or instrument commonly known as a security.

*Securities Documentation.* The applicable statement of terms, trust agreement, trust indenture, securities agreement or other documents establishing the terms of a Book-entry Ginnie Mae Security.

*Transfer message.* An instruction of a member of a Federal Reserve Bank to effect a transfer of a Book-entry Security (including a Book-entry Ginnie Mae Security) maintained in the Book-entry System, as set forth in Federal Reserve Bank Operating Circulars.

(b) *Other Terms.* Unless the context requires otherwise, terms used in this part that are not defined in this part, have the meanings as set forth in 31 CFR 357.2. Definitions and terms used in 31 CFR part 357 should read as though modified to effectuate their application to Ginnie Mae Securities.

#### **§ 350.3 Maintenance of Ginnie Mae Securities.**

A Ginnie Mae Security may be maintained in the form of a Definitive Ginnie Mae Security or a Book-entry Ginnie Mae Security. A Book-entry Ginnie Mae Security shall be maintained in the Book-entry System.

#### **§ 350.4 Law governing rights and obligations of United States, and Federal Reserve Banks as Depositories; Rights of any Person against United States, and Federal Reserve Banks as Depositories; Law Governing Other Interests.**

(a) Except as provided in paragraph (b) of this section, the following rights and obligations are governed solely by the book-entry regulations contained in this part, the Securities Documentation, and Federal Reserve Bank Operating Circulars (but not including any choice of law provisions in the Security Documentation to the extent such provisions conflict with the Book-entry regulations contained in this part):

(1) The rights and obligations of a Federal Reserve Bank as a Depository with respect to:

(i) A Book-entry Ginnie Mae Security or Security Entitlement; and

(ii) The operation of a book-entry system operated by a Depository as it applies to Ginnie Mae Securities; and

(2) The rights of any Person, including a Participant, against the Federal Reserve Banks as Depositories with respect to:

(i) A Book-entry Ginnie Mae Security or Security Entitlement; and

(ii) The operation of the book-entry system operated by the Federal Reserve Banks as Depositories as it applies to Ginnie Mae Securities.

(b) A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Participant and that is not recorded on the books of a Federal Reserve Bank pursuant to § 350.5(c)(1), is governed by the law (not including the conflict-of-law rules) of the jurisdiction where the head office of the Federal Reserve Bank maintaining the Participant's Securities Account is located. A security interest in a Security Entitlement that is in favor of a Federal Reserve Bank from a Person that is not a Participant, and that is not recorded on the books of a Federal Reserve Bank pursuant to § 350.5(c)(1), is governed by the law determined in the manner specified in paragraph (d) of this section.

(c) If the jurisdiction specified in the first sentence of paragraph (b) of this section is a State that has not adopted Revised Article 8, then the law specified in paragraph (b) of this section shall be the law of that State as though Revised Article 8 had been adopted by that State.

(d) To the extent not otherwise inconsistent with this part, and notwithstanding any provision in the Security Documentation setting forth a choice of law, the provision set forth in 31 CFR 357.11 regarding law governing other interests apply and shall be read as though modified to effectuate the application of 31 CFR 357.11 to Book-entry Ginnie Mae Securities.

#### **§ 350.5 Creation of Participant's Security Entitlement; Security Interests.**

(a) A Participant's Security Entitlement is created when a Federal Reserve Bank indicates by book-entry that a Book-entry Ginnie Mae Security has been credited to a Participant's Securities Account.

(b) A security interest in a Security Entitlement of a Participant in favor of the United States to secure deposits of public money, including without limitation deposits to the Treasury tax and loan accounts, or other security interests in favor of the United States that is required by Federal statute, regulation, or agreement, and that is marked on the books of a Federal Reserve Bank is thereby effected and perfected, and has priority over any other interest in the securities. Where a security interest in favor of the United States in a Security Entitlement of a Participant is marked on the books of a Federal Reserve Bank, such Reserve Bank may rely, and is protected in relying, exclusively on the order of an authorized representative of the United States directing the transfer of the security. For purposes of this paragraph, an "authorized representative of the

United States" is the official designated in the applicable regulations or agreement to which a Federal Reserve Bank is a party, governing the security interest.

(c)(1) The Federal Reserve Banks as Depositories have no obligation to agree to act on behalf of any Person or to recognize the interest of any transferee of a security interest or other limited interest in favor of any Person except to the extent of any specific requirement of Federal law or regulation or to the extent set forth in any specific agreement with the Federal Reserve Bank on whose books the interest of the Participant is recorded. To the extent required by such law or regulation or set forth in an agreement with a Federal Reserve Bank, or the Federal Reserve Bank Operating Circular, a security interest in a Security Entitlement that is in favor of a Federal Reserve Bank or a Person may be created and perfected by a Federal Reserve Bank as Depository marking its books to record the security interest. Except as provided in paragraph (b) of this section, a security interest in a Security Entitlement marked on the books of a Federal Reserve Bank shall have priority over any other interest in the securities.

(2) In addition to the method provided in paragraph (c)(1) of this section, a security interest, including a security interest in favor of a Federal Reserve Bank, may be perfected by any method by which a security interest may be perfected under applicable law as described in § 350.4(b) or (d). The perfection, effect of perfection or non-perfection and priority of a security interest are governed by such applicable law. A security interest in favor of a Federal Reserve Bank shall be treated as a security interest in favor of a clearing corporation in all respects under such law, including with respect to the effect of perfection and priority of such security interest. A Federal Reserve Bank Operating Circular shall be treated as a rule adopted by a clearing corporation for such purposes.

#### **§ 350.6 Obligations of the Reserve Banks as Depositories; No Adverse Claims.**

Except in the case of a security interest in favor of the United States or a Federal Reserve Bank or otherwise as provided in § 350.5(c)(1), for the purposes of this part, the Federal Reserve Banks as Depositories shall treat the Participant to whose Securities Account an interest in a Book-entry Ginnie Mae Security has been credited as the person exclusively entitled to issue a Transfer Message, to receive interest and other payments with respect thereof and otherwise to

exercise all the rights and powers with respect to such Security, notwithstanding any information or notice to the contrary. The Federal Reserve Banks as Depositories are not liable to a Person asserting or having an adverse claim to a Security Entitlement or to a Book-entry Ginnie Mae Security in a Participant's Securities Account, including any such claim arising as a result of the transfer or disposition of a Book-entry Ginnie Mae Security by a Federal Reserve Bank pursuant to a Transfer Message that the Federal Reserve Bank reasonably believes to be genuine.

**§ 350.7 Authority of Federal Reserve Banks as Depositories.**

(a) Each Federal Reserve Bank is hereby authorized as Depository for Book-entry Ginnie Mae Securities to perform the following functions with respect to Book-entry Ginnie Mae Securities to which this part applies, in accordance with the Securities Documentation, Federal Reserve Bank Operating Circulars, this part, and procedures established by the Secretary consistent with these authorities:

- (1) To service and maintain Book-entry Ginnie Mae Securities in accounts established for such purposes;
- (2) To make payments with respect to such securities;
- (3) To effect transfer of Book-entry Ginnie Mae Securities between Participants' Securities Accounts as directed by the Participants;
- (4) To effect conversions between Book-entry Ginnie Mae Securities and Definitive Ginnie Mae Securities pursuant to the applicable Securities Documentation; and
- (5) To perform such other duties as the Federal Reserve Banks as

Depositories may be requested by Ginnie Mae.

(b) Each Federal Reserve Bank as Depository may issue Operating Circulars, not inconsistent with this part, governing the details of its handling of Book-entry Ginnie Mae Securities, Security Entitlements, and the operation of the book-entry system under this part.

**§ 350.8 Withdrawal of Eligible Book-entry Ginnie Mae Securities for Conversion to Definitive Form.**

(a) Eligible Book-entry Ginnie Mae Securities may be withdrawn from the Book-entry System by requesting delivery of like Definitive Ginnie Mae Securities.

(b) A Reserve Bank as Depository shall, upon receipt of appropriate instructions to withdraw Eligible Book-entry Ginnie Mae Securities from book-entry in the Book-entry System, facilitate the conversion of such securities into Definitive Ginnie Mae Securities and their delivery in accordance with such instructions. No such conversion shall affect existing interests in such Ginnie Mae Securities.

(c) All requests for withdrawal of Eligible Book-entry Ginnie Mae Securities must be made prior to the maturity or date of call of the securities.

(d) Definitive Ginnie Mae Securities that are to be delivered upon withdrawal may be issued in either registered or bearer form, to the extent permitted by the applicable Securities Documentation.

**§ 350.9 Waiver of Regulations.**

Ginnie Mae reserves the right in its discretion, to waive any provision(s) of these regulations in any case or class of cases for the convenience of Ginnie Mae or the United States, or in order to

relieve any Person(s) of unnecessary hardship, if such action is not inconsistent with law, does not adversely affect any substantial existing rights, and the Association is satisfied that such action will not subject the Association or the United States to any substantial expense or liability.

**§ 350.10 Liability of Federal Reserve Banks as Depositories.**

The Federal Reserve Banks as Depositories may rely on the information provided in a Transfer Message, and are not required to verify the information. The Federal Reserve Banks as Depositories shall not be liable for any action taken in accordance with the information set out in a Transfer Message, or evidence submitted in support thereof.

**§ 350.11 Notice of Attachment for Ginnie Mae Securities in Book-entry System.**

The interest of a debtor in a Security Entitlement may be reached by a creditor only by legal process upon the Securities Intermediary with whom the debtor's securities account is maintained, except where a Security Entitlement is maintained in the name of a secured party, in which case the debtor's interest may be reached by legal process upon the secured party. These regulations do not purport to establish whether a Federal Reserve Bank as Depository is required to honor an order or other notice of attachment in any particular case or class of cases.

Dated: August 14, 2001.

**Ronald A. Rosenfeld,**

*President, Government National Mortgage Association.*

[FR Doc. 01-21109 Filed 8-21-01; 8:45 am]

**BILLING CODE 4210-66-P**